UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of:

MIKE-SELL'S POTATO CHIP CO.

and

Case No. 09-CA-184215

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE, AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957

RESPONDENT'S REPLY TO THE GENERAL COUNSEL'S ANSWERING BRIEF

The General Counsel's Answering Brief is fundamentally flawed because it relies entirely on assumptions at odds with the undisputed facts and legal precedent. The General Counsel refers to the Company's decision to sell its routes as "subcontracting." (GC's Brief at 1.) But the Company's decision to sell routes to distributors to effect a change in its business model does ***not*** amount to subcontracting. Rather, as recognized by controlling law and the Paolucci Award, Mike-sell's transferred both the risk ***and*** potential reward to distributors, thereby removing it from the realm of subcontracting. (Tr. 151-52, 163-64, 259-60, 263-64, 273-74, 874-75; RX-2.)

The General Counsel's continued reliance on *Fibreboard Paper v. NLRB*, 379 U.S. 203 (1965), is woefully misplaced. (GC's Brief at 7.) The U.S. Supreme Court expressly limited its holding in *Fibreboard* to the unique and specific facts of that case and did not intend it to apply to every conceivable instance of alleged "subcontracting." Chief Justice Warren wrote:

> We are thus ***not*** expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). ***Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy.***

379 U.S. at 215 (emphasis added). Justice Douglas made this doubly clear in his concurrence, stating:

> The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that ***this*** employer's decision to subcontract ***this*** work, involving 'the

> replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment,' is subject to the duty to bargain collectively.

Id. at 203 (emphasis added).

The specific type of "subcontracting" to which *Fibreboard* applies is patently different from the Company's sale of routes to distributors. Not only did the *Fibreboard* contractors perform the same work that company employees had performed, but also they did so on company premises, with company-owned equipment, under the direct control of company supervisors. *Id.* at 213. Fibreboard remained responsible for whatever maintenance costs were incurred by the contractors, and the employer ***directly*** enjoyed the benefit of the contractor's work. *Id.* at 219.

The decision to subcontract the maintenance work in *Fibreboard* did not change the basic operation of the employer's business, which remained exactly the same. *Id.* at 213. Accordingly, to require bargaining about this subcontracting decision did ***not*** significantly abridge Fibreboard's freedom to manage its business. *Id.* Moreover, the advantages Fibreboard realized from subcontracting were derived almost entirely from the elimination of employee wages and fringe benefits, as well as adjustments in work schedules, enforcement of more stringent production quotas, and closer supervision of new personnel. *Id.* at 219. These topics are uniquely suited for collective bargaining because the union can offer meaningful concessions that result in the same advantages to the employer.

The facts of the instant case are entirely different from *Fibreboard* and its progeny. Here, distributors ***take title to the Company's product*** and ***retain complete discretion to raise and lower product prices***—with the exception of a few chain accounts having enough market clout to insist on maximum prices. (Tr. 570, 608, 990-91; JX-12, § 3; RX-16, § 3.) Distributors assume the risk of loss ***and*** the potential gains associated with owning and selling Company product. Mike-sell's retains no legal concern over what is done with its product, imposing no performance standards whatsoever beyond basic sanitation. (Tr. 559, 596-97, 593, 968, 983-84; RX-16.) All other business decisions—including when and how to distribute, to whom to distribute, what and how much product to order, where to store the product, what to charge for the product, whether to extend credit to customers, and how to advertise—are made by distributors. (Tr. 563, 597-99, 602, 625-26, 967-68, 970, 987.) Unlike in *Fibreboard*, the work performed by distributors is ***not*** performed from the Mike-sell's facility, nor is the Company directly concerned with whether any distributor sustains a profit or loss. The distributors own and operate their own trucks, and they may hire their own employees to distribute products for them. (Tr. 487, 488, 508, 509, 566, 606, 962, 965.)

These distinctions are not mere technicalities but are fundamental differences that change the nature of the Company's business model. Mike-sell's is ***not*** simply replacing bargaining unit employees with those of independent contractors to avoid labor costs. Rather, distributors enjoy a level of independence and autonomy that makes them materially different from in-house drivers. Distributors have far more at stake than simply earning a living, and unlike drivers, they have no weekly "salary guarantee" to save them if their sales falter. The success of their own enterprises—and of their own employees—depends on their independent ability to successfully manage the financing, inventory, storage, and distribution of the snack food products they purchase outright from the Company. (Tr. 163-64, 259-60; RX-2, p. 17.)

Managing one's own distribution business can be highly lucrative, as explained by driver-turned-distributor Lisa Krupp. (Tr. 988-89.) But going into business for oneself is also a risky venture, as distributors cannot rely on Mike-sell's to cover the losses they may suffer due to low sales, stale or expired product, uncollectible accounts, or damaged or stolen inventory. (Tr. 556-57, 596, 669, 970-71.) The gravity of risk distributors face is perhaps best evidenced by the many former distributors—like Keystone, Gaudio, Helm, and Buckeye—who have gone out of business and/or filed bankruptcy. It is this same risk of loss that motivated Mike-sell's to change its business model by minimizing its distribution, liquidating its capital, and reallocating its scarce resources toward core manufacturing and branding initiatives—two activities at the heart of its business. (Tr. 173, 244-45, 318, 340, 374, 549-53, 557, 898; RX-27; RX-28.)

The General Counsel attempts to downplay the autonomy with which distributors run their businesses, emphasizing that they deliver to the same customers and drive the same vehicles formerly owned by Mike-sell's. (GC's Brief at 7-8.) Not only is this generalization inaccurate,[1] but it also misses

[1] Independent distributors do not run the exact same routes as in-house drivers. They are instead free to add or remove customers at their own discretion. (Tr. 599-600, 967.)

the point entirely. Whether distributors and drivers perform similar work is not fundamentally material; what matters is the fact that distributors perform work primarily for their own benefit, whereas drivers perform work for the benefit of Mike-sell's.

The fact that Mike-sell's may finance the sale of routes as part of an arms-length transaction does not change the underlying analysis. *Fibreboard* confirms that the relevant question is not ***how*** Mike-sell's transfers its interest in the delivery of product to a distributor—just whether the Company continues to directly control, and enjoy the benefits of, that work. In *Fibreboard*, the contractors ***still worked for Fibreboard***, the direct beneficiary of their labor. Here, distribution rights are sold to independent businesses; those businesses—***not Mike-sell's***—control distribution and are directly impacted by their success or failure in reselling product bought outright from the Company. If a distributor chose—for example—to sit at home all week and eat Mike-sell's chips rather than distributing that inventory to customers, ***the Company would still get paid.*** It is the distributor—not Mike-sell's—who would be out the money for the product. Hence, there is more involved than just substituting one set of workers for another.

Even if selling routes to distributors could be considered "subcontracting," that alone would not require Mike-sell's to bargain over the sale of routes. The U.S. Supreme Court confirmed in *Fibreboard* that some types of subcontracting involve such important and complex business decisions that mandatory bargaining would be inappropriate. *Fibreboard*, 379 U.S. at 215. The General Counsel seems to view a profitability determination as one such complex business decision that need not be bargained, justifying the Union's failure to protest the sale of routes in 2012 and 2013 based on their "unprofitab[ility]." (GC's Brief at 2-3.) The Union likewise objected to the sale of Routes 104 and 122 because "they do not have the same characteristics as the route involved in the Paolucci decision," i.e., they were not "unprofitable." (ALJ, pp. 11-12; Tr. 156-157, 89; JX-8.) The Union's request for all documents that demonstrate the profitability of Company routes further implies that sales based on "profitability" are not suitable for bargaining. (JX-8, p. 2.) It thus makes little sense for the General Counsel to argue that the Company's decision to sell four discrete business units—as part of a strategy to minimize the impact of an unprofitable and outdated distribution model—is a mandatory subject of bargaining. That Mike-sell's is concerned with the overall profitability of the distribution division—as opposed to the profitability of individual routes—does not alter the analysis with respect to whether the decision is appropriate for collective bargaining. In either scenario, Mike-sell's is changing the scope and direction of its business due to concerns that cannot be alleviated by Union concessions. As Arbitrator Paolucci recognized, the sale of a single route reflects "a whole new method of doing business" because it necessarily involves consideration of several factors beyond labor costs, such as return on investment and net impact on enterprise profitability. (RX-2 pp. 17-19.)

Not surprisingly, the General Counsel ignores the complexity of the Company's change in business model. This is likely because the intricacy of that decision is irrefutable. The Company's entire route sales division is unprofitable, which resulted in a business decision to sell ***any*** route for which a buyer could be located. (Tr. 234-35, 238.) The Company's economic analysis focused on shifting the risk of loss, liquidating assets, and reallocating capital toward manufacturing. (Tr. 244-45, 320, 331, 340, 557, 898.) The elimination of Routes 102, 104, 122, and 131 collectively resulted in the one-time liquidation of assets valued at $126,000, as well as annual savings of nearly $195,000 for ***non-labor*** expenses. (ALJ, p. 13; Tr. 538-541-42.) The route eliminations also resulted in about $229,000 in annual labor cost savings, but those savings would be offset by the higher cost of distributor margins totaling $324,000 for the same time period. (ALJ, p. 13; Tr. 540.) When labor ***and*** non-labor savings were compared to the cost of distributor margins, Mike-sell's saved over $89,000 annually—while putting much less at risk—and the Company could also afford a major capital investment in new manufacturing equipment due to recouped capital and increased lines of credit. (Tr. 284, 540, 542-43, 548-55, RX-27; RX-28.) These benefits—particularly those derived from shifting the risk of loss—could not have been achieved at the bargaining table.

Given the Company's focus on overall enterprise profitability, *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981), is on point. There, as here, the employer was focused on profitability as a whole, and the decision to cancel an individual service contract (just as the decision to sell individual routes as discrete business units) involved a change in the scope and direction of the enterprise, akin to the decision of whether to be in business at all. *Id.* at 677. The U.S. Supreme Court recognized that the employer's need to operate freely in deciding whether to shut down part of its business for economic reasons outweighed any incremental benefit that might be gained through the union's participation in making the decision. *Id.*

As in *First Nat'l Maint.*, the Company's decision to sell individual routes came from a desire to eliminate (as much as possible) the effects of an outdated, unprofitable distribution model and refocus efforts on manufacturing and branding. If labor costs were the concern, Mike-sell's could just seek Union concessions. But bargaining over the sale of routes would be futile, given the relatively small role labor costs played in the Company's economic and strategic analysis. (Tr. 306, 318, 320, 331, 340, 355, 364.) Forcing the parties to bargain when the Union could not possibly offer Mike-sell's what it ultimately needs—a shift in the risk of loss—would only lead to Mike-sell's incurring more loss, and wasting valuable time and resources.

For these reasons, *Dubuque Packing Co.*, 303 NLRB 386 (1991), is also inapposite. There, the decision to ***relocate*** work from a union to non-union facility was based ***entirely*** on labor costs, as seen from the company's repeated attempt to seek union concessions. *Id.* at 393. The employer admitted that labor concessions ***could*** have changed the decision to relocate in *Dubuque*, so the matter was well-suited for collective bargaining. *Id.* Here, there was no "relocation" of work. Mike-sell's instead sold its routes to independent businesses, divesting itself of both risk and reward. That cost-prohibitive pension withdrawal liability prevents Mike-sell's from selling ***all*** routes does not change the nature of its decision to sell individual routes, which—as evidenced by drivers' strong preferences—function as discrete and severable business units. Mike-sell's was not motivated by labor costs, or any other factor subject to Union influence. Thus, unlike in *Dubuque*, the Union could not have changed the Company's decision.

As the Board made clear in *Dubuque*, the 8(a)(5) analysis ultimately turns on the central purpose of the Act: to promote labor peace through collective bargaining ***over those matters suitable for negotiation***. 303 NLRB at 392. The Act was not intended to serve either party's individual interest, but to foster a neutral system where conflicting interests could be resolved. *First Nat'l Maint.*, 452 U.S. at 680-81. A union's ultimate interest—in any employer decision—is job security. *Id.* at 681. But here, allowing the Union to participate in the decision-making process over the sale of routes would <u>not</u> improve job security, as no jobs were lost as a result of the Company's decision to sell routes. (Tr. 113, 182, 248-49, 377, 408.) Hence, the Union's participation could only serve to forestall the inevitable.

The proper protection for the Union's interest in this case would have come in the form of effects bargaining. Effects bargaining would preserve the Company's freedom to choose its own business model while also giving employees a chance to bargain over any loss they suffered due to the sale of routes—such as being forced to bump into a route with lower weekly sales. But the Union never accepted the Company's offer to bargain over any alleged effects.

The General Counsel refers to the Company's citation to Section 8(a)(3) of the Act as "misplaced." (GC's Brief at 24). But it is Section 8(a)(3) that protects the Union's interest in fair dealing by prohibiting management decisions—that could otherwise be made without Union input—if they are motivated by antiunion animus. *See* Respondent's Exceptions Brief at 16-17. There is no evidence that anti-union animus motivated the Company's decision to sell its routes, and absent such evidence, Mike-sells retains the ***inherent*** right to transfer and assign work, change operational procedures, invest or withdraw capital, and sell or merge business units. *See, e.g., NLRB v. Transmarine Nav. Corp.*, 380 F.2d 933, 938-39 (9th Cir. 1967). *See* Respondent's Exceptions Brief at n.3.

Because the Union's interests remained protected under the Act despite its inability to offer meaningful concessions, the cases cited by the General Counsel are inapplicable. *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253 (2006), concerned a company's decision to close an operation and transfer driving work from terminated union workers to nonunion, independent contractors. In addition to finding an 8(a)(5) violation, the Board found the company violated Section 8(a)(1) by threatening plant closures and surveillance, as well as evidence of antiunion animus in the form of deceitful tactics in violation of Section 8(a)(3). *Id.* at 254-55, 278. Similarly, *Gaetano & Associates*, 344 NLRB 531, 533 (2005), concerned the violation of Sections 8(a)(1), (3) and (5) of the Act after the employer subcontracted sheetrocking and related work. *Id.* at 532. Chairman Battista noted "that the issue of subcontracting may turn, *inter alia*, on whether the subcontracting was based on labor costs or other factors that are particularly amenable to the bargaining process." *Id.* at 533, n.16. In that case, however, the employer proffered no reason for the subcontracting, but simply made broad generalizations about the right to make economic and management decisions. *Id.* at 543. Unlike *Dallas & Mavis* and *Gaetano*, there is no allegation that Mike-sell's acted with improper or unclear motives in selling the routes at issue. The Company articulated a detailed business reason for its decision, based on strategic considerations unrelated to labor costs.

In *Bob's Big Boy Family Restaurants*, 264 NLRB 1369 (1982), a company's decision to contract out its shrimp processing operation was found a mandatory subject of bargaining because the decision was based almost entirely on controlling wages and labor costs. *Id.* at 1372. The company did not change its business at all. The processing work was simply performed by subcontractors rather than by company employees, and the company retained possession and ownership of the equipment used for the processing. *Id.* at 1370-71. In seeking to subcontract the processing work, the employer's concerns "were of the type traditionally suitable for resolution through the collective-bargaining process," as "wages, fringe benefits, and other employment costs" were topics over which the union exercised substantial control. *Id.* Thus, the Board was unwilling to say that collective bargaining would be of minimal value.

Unlike in *Bob's Big Boy*, the Company's decision to minimize its distribution business is not motivated by labor costs. Mike-sell's is instead concerned about the overall welfare of the Company and the overall unprofitability of its distribution division. Labor costs alone do not make distribution unprofitable for Mike-sell's; in fact, the margins paid to distributors far exceed the Company's labor costs. Rather, it is the risk of loss that makes distribution a losing proposition for Mike-sell's. (Tr. 543, 834-35.) These are not concerns the Union could influence through collective bargaining.

Ultimately, as was the case in *First Nat'l Maint.*, *Adams Dairy*, 350 F.2d 108 (8th Cir. 1965), and *W. Virginia Baking Co.*, 299 NLRB 306 (1990), the Company's decision to sell off individual routes constitutes a change in the scope and direction of its business motivated by factors beyond mere labor costs. The Board has acknowledged that the liquidation of the driver-salesman method of distribution constitutes a fundamental change in the nature and direction of the employer's operation. *See W. Virginia Baking*, 299 NLRB 306. That Mike-sell's is unable to fully liquidate its entire route-sales division immediately—and instead liquidated only 25% of it in 2016—does not change the fact that the sale of four routes effects a fundamental change in the scope and direction of the Company's business as to those discrete business units. There is no basis to hold that a business change of this nature cannot happen gradually, over time.

Even if the Union had some right to bargain over the sale of routes, the Union waived that right when it failed to file a grievance over the sale of Route 102. The General Counsel claims the Union ***did*** request bargaining of that sale, citing the initial grievance filed in May 2016. This argument makes no sense. If the May 2016 grievance covered the sale of Route 102, it should have equally covered the sale of Routes 104, 122, and 131—yet the Union filed separate grievances over the sale of those routes. (JX-7; JX-11.) Moreover, the General Counsel repeatedly insists the Union did not protest the sale of routes in 2012 and 2013 because they were unprofitable. But the Union did not know which routes would be sold—or whether they were profitable—at the time the May 2016 grievance was filed. Nor is it believable that the Union did not grieve the sale of Route 102 because doing so would be "futile." (GC's Brief at 15.) Mike-sell's expressly stated in its September 2016 letter that it would not bargain over the sale of Routes 104 and 122—and the Company gave no indication it would bargain over the sale of Route 131—yet the Union still filed a grievance with respect to the sale of those routes. (JX-7; JX-9; JX-11.)

Ultimately, the General Counsel concedes that Mike-sell's was within its rights to sell "unprofitable routes." (GC's Brief at 21.) Whether the Union believes the individual routes at issue were profitable or not is immaterial. It is undisputed that Mike-sell's provided the Union with copies of requested Profit-and-Loss Statements for the Company's entire route sales division, all of which reflect large-scale losses. (Tr. 475-76; RX-15.) The General Counsel therefore has no basis to suggest that the unilateral sale of routes was impermissible. The unilateral sales instead were consistent with controlling NLRB law, judicial precedent, and the NLRA. For these reasons, the NLRB should grant Respondent's Exceptions and issue an order overruling the ALJ's Decision.

Dated: November 17, 2017

Respectfully submitted,

Jennifer R. Asbrock

Jennifer R. Asbrock
jasbrock@fbtlaw.com
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
Telephone: (502) 589-5400
Facsimile: (502) 581-1087
Counsel for Respondent Mike-sell's Potato Chip Co.

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2017, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlrb.gov) to the National Labor Relations Board's Office of the Executive Secretary, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

Garey E. Lindsay, Regional Director
Linda Finch, Counsel for the General Counsel
National Labor Relations Board Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
(*via email at Linda.Finch@nlrb.gov*)

John R. Doll, Counsel for Charging Party
c/o Doll, Jansen, & Ford
111 W. First St., Suite 1100
Dayton, Ohio 45402-1156
(*via email at jdoll@djflawfirm.com*)

Office of the General Counsel
c/o National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
(*via U.S. mail*)

Jennifer R. Asbrock
Counsel for Respondent Mike-sell's Potato Chip Co.

EN11783.Public-11783 4850-8458-1460v2